No. 86-1659

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

CONTINENTAL CAN COMPANY,
Petitioner,

v.

ROBERT GAVALIK, *et al.*, and
ALBERT JAKUB, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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RESPONSE TO SUPPLEMENTAL BRIEF

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RESPONSE TO SUPPLEMENTAL BRIEF

Petitioner's supplemental brief wrongly asserts that recent decisions of the Court support petitioner's quest for *certiorari*. Those decisions are inapposite.

I. ARBITRATION

Petitioner claims that *Shearson/American Express, Inc. v. MacMahon*, 107 S. Ct. 2332 (1987), read in conjunction with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), "strongly supports Continental's position that the claims of the respondents should have been arbitrated" (Supp. Br. 1). But even assuming that the principles respecting *commercial* arbitration announced in *Shearson* and *Mitsubishi* were applicable to *labor* arbitration—a doubtful proposition in its own right [1]—those decisions would have nothing to do with the arbitral exhaustion issue presented in this case. This is so for two reasons.

1. First, in this case, unlike *Shearson* and *Mitsubishi*, there was no agreement to arbitrate statutory claims. The issue in *Shearson* and *Mitsubishi* was whether parties who had *agreed* to arbitrate statutory claims would be held to their bargain, *i.e.*, whether a lawsuit asserting statutory claims was foreclosed forever because the plaintiff had agreed that the forum for resolution of such

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[1] *Shearson* and *Mitsubishi* cite no labor arbitration decisions, while, in turn, the six Supreme Court decisions rejecting any requirement of arbitral exhaustion of *employee* statutory claims (Br. Op. 9-10) cite no commercial arbitration decisions. Unlike the national policy favoring arbitration of statutory disputes in the commercial arena, *Shearson, supra*, the national *labor* policy favors arbitration only of *contractual* disputes, § 203(d) of the LMRA, 29 U.S.C. § 173(d); *Steelworkers v. American Mfg. Co.*, 363 U.S. 565, 566 (1960); *Steelworkers v. Enterprise Wheel Co.*, 363 U.S. 593, 597-99 (1960), and *disfavors* the arbitration of rights conferred upon individual employees by federal statutes. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55-60 (1974); *Barrentine v. Arkansas-Best Motor Freight System*, 450 U.S. 728, 737-45 (1981); *McDonald v. West Branch*, 466 U.S. 284, 290-92 (1984).

claims would be arbitration. Central to the Court's resolution of those cases, was, of course, that the parties *in fact* had agreed to arbitrate statutory claims and not merely disputes over the meaning or application of their contract.[2]

In the instant case, as both lower courts held (Br. Op. 11-13), there was no agreement to arbitrate claims of violation of § 510 of ERISA. Indeed, the agreements here—as is customary in the case of *labor* arbitration—expressly confined the arbitrator's power to the resolution of contractual claims.[3] If an arbitrator undertook to resolve a statutory claim in the face of this limitation on his/her power, the award would be invalid. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53-54 (1974); *Barrentine v. Arkansas-Best Motor Freight System*, 450 U.S. 728, 744-45 (1981); *McDonald v. West Branch*, 466 U.S. 284, 290-91 (1984).

This case, thus, has nothing to do with the issue addressed in *Shearson* and *Mitsubishi*, *i.e.*, the court's duty when the parties *have* agreed to arbitrate statutory

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[2] In *Shearson*, the broker and customer had agreed to arbitrate "any controversy arising out of or relating to my [the customer's] accounts, to transactions with you for me *or* to this agreement or the breach thereof," 107 S. Ct. at 2335 (emphasis added). The Court held this language—which it construed to embrace "any controversy relating to the accounts" (*id.*)—broad enough to encompass statutory as well as contractual claims. Similarly, in *Mitsubishi*, the parties had agreed to arbitrate "[a]ll disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] *out of or in relation to* Articles I-B through V of this Agreement *or* for the breach thereof," 473 U.S. at 617 (emphasis added), language which the plaintiff acknowledged embraced its statutory claims "as a matter of standard contract interpretation" and which the Court interpreted accordingly, *id.* at 624 & n.13.

[3] The arbitrator "shall have authority only to interpret and apply the provisions of this Agreement" (Pet. App. 126a) and "shall not have jurisdiction to alter or amend in any way the provisions of this Agreement and his decision must be in accordance with the terms of this Agreement" (*id.* 112a).

claims. This case, rather, is like *Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228 (1972), where the Court dismissed the writ of certiorari as improvidently granted precisely because the arbitration clause did not encompass statutory disputes.[4]

2. Petitioner's reliance on *Shearson* and *Mitsubishi* is misplaced for a second reason: in those cases, the party seeking to litigate a statutory claim had *itself* agreed to arbitrate that claim. In this case, by contrast, even if the arbitration clause had encompassed statutory disputes, the employees filing this suit were not themselves parties to that arbitration agreement, and never agreed to arbitrate their statutory claims. The Company is invoking an arbitration agreement it entered into with a

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[4] Petitioner, in its Reply Brief, attempts to bring the ERISA claim under the collective bargaining agreement by *incorrectly* stating that the parties incorporated § 510 of ERISA into their agreement. Thus, petitioner states (Reply Br. at 2 n.2):

> Through collective bargaining, the parties created the terms and conditions of the pension rights at issue here including . . . the substantive prohibition contained in section 510: "The company may not fire you or discriminate against you to prevent you from obtaining a pension or deferred vested benefit to which you are entitled under the Plan or keep you from exercising your rights under ERISA." *Petition* at 124a.

Petitioner has misrepresented the character of the document it relies on for this assertion, which is partially reprinted at pp. 118a-125a of the Petition. That document is *not* an agreement between the Company and Union. It is, rather, a "summary plan description," prepared unilaterally by the Company to fulfill its disclosure obligations under §§ 101-02 of ERISA, 29 U.S.C. §§ 1021-22. Department of Labor regulations require that every employer include, in its summary plan description, a statement of the protection afforded employees by § 510. *See*, 29 C.F.R. § 2520.102-3(t)(2). There is no agreement between the Company and Union in which the Company promises to comply with § 510, and thus there is no basis for the Company's contention that the Company and Union, by providing for arbitration of alleged violations of their *agreement*, have agreed to arbitrate claims that § 510 was violated.

union, not with the employees. And as this Court has repeatedly held, employees are not obliged to arbitrate claims arising under federal statutes that confer minimum substantive rights upon individual workers, *even if* their union has agreed with the employer that such statutory claims are arbitrable. *See*, Br. Op. 9-10.

Nor can it be contended that a union's agreement to arbitrate statutory claims should bind the employees on an agency theory. For unlike *contractual* claims, as to which a union serves as the employees' bargaining agent and can commit the employees to arbitration, *Vaca v. Sipes*, 386 U.S. 171, 177, 182, 184, 191 (1967), a union is *not* the bargaining agent of the employees with respect to their rights under statutes (like § 510 of ERISA) conferring minimum substantive rights. Such statutes give "individual employees a non-waivable, public law right . . . that [is] separate and distinct from the rights created through the 'majoritarian processes' of collective bargaining." *Barrentine, supra*, 450 U.S. at 737-38. Such rights "are independent of the collective bargaining process. They devolve on petitioners as individual workers, not as members of a collective organization." *Id.* at 745. "Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose." *Gardner-Denver, supra*, 415 U.S. at 51.

The crux of *Shearson* and *Mitsubishi* is that a party who agrees to arbitrate statutory claims thereby makes a choice of forum and waives the right to a judicial resolution of those claims. *See, e.g., Shearson*, 107 S. Ct. at 2337, 2339, 2346. In the instant case, neither the employees nor their union has made such a choice of forum. And even had the union agreed to arbitration of § 510 claims (which it did not), the union did not have authority to barter away the right to sue that Congress

conferred upon the employees alone.[5] *Shearson* and *Mitsubishi* thus lend no support to petitioner.[6]

II. STATUTE OF LIMITATIONS

Petitioner's contention that recent decisions of this Court impeach the correctness of the decision below as to the applicable limitations period is unsound, as we show *infra*. Preliminarily, we note that even were there arguable substance to petitioner's contention, this case could not be the vehicle for addressing that contention. For, were a shorter limitations period rendered applicable to ERISA § 510 cases by reason of recent decisions of this Court, the shorter time limit still would not apply retroactively to this case. That is the lesson of this Court's recent decision in *Saint Francis College v. Al-Khazraji*, 107 S.Ct. 2022 (1987) (declining to decide whether *Wilson v. Garcia* controls applicable time limit in cases arising under 42 U.S.C. § 1981, because *Wilson* would not in any event apply retroactively to cases filed in reliance on longer time limit previously announced by Third Circuit).

The complaints in this consolidated case were filed in 1981 and 1982, at a time when the Third Circuit's "consistent rulings [were] that employment discrimination or wrongful discharge claims brought under federal law are

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[5] The inapplicability of *Shearson* and *Mitsubishi* is evident from yet another consideration. Those cases did not mandate *exhaustion* of arbitral remedies *prior* to suit, they held the right to sue in court had been *waived forever* by the agreement to arbitrate. Petitioner does not even *contend* that the holding of those cases applies here, *i.e.*, that plaintiffs are barred forever from bringing to court their claims under § 510 of ERISA.

[6] A recent district court decision supports the point made at Br. Op. 15. *Treadwell v. John Hancock Mutual Life Inc. Co.*, —— F.Supp. ——, Civ. Ac. No. 85-3589 (D.Mass., June 25, 1987). That court in an earlier case had held arbitral exhaustion required in an ERISA § 510 action, *King v. James River-Peperell, Inc.*, 592 F.Supp. 54 (D.Mass. 1984), but reversed itself in *Treadwell* in light of the "shift in case law since the decision in *King*," *i.e.*, the more persuasive reasoning of the opinions in *Amaro* and *Zipf*.

governed by Pennsylvania's six-year" time limit (Pet. App. 20a). *See, e.g., Davis v. United States Steel Supply*, 581 F.2d 335 (3rd Cir. 1978); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 477 (3d Cir. 1978), *cert. denied*, 444 U.S. 832 (1979). The non-retroactivity principle of *Al-Khazraji* thus would pretermit determination by this Court in *this* case whether a shorter time limit is applicable to ERISA § 510 actions in light of recent decisions of this Court.[7]

In any event, recent decisions of this Court do not support petitioner's quest for a shorter time limit for ERISA § 510 actions.

A. In support of its quest for certiorari to review its claim that the six-month time limit of § 10(b) of NLRA governs suits under § 510 of ERISA, petitioner's supplemental brief notes that the Court borrowed a federal rather than state statute of limitations in *Agency Holding Corp. v. Malley-Duff and Assocs.*, 107 S.Ct. 2759 (1987), to determine the time limit for civil RICO actions. But the Court reemphasized in *Malley-Duff*, as it had previously in *DelCostello v. Teamsters*, 462 U.S. 151 (1983) (*see* Br. Op. 19), that the borrowing of a federal time limit is a departure from the norm to be indulged only in exceptional cases:

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[7] Petitioner, at Supp. Br. 8-9, n.2, acknowledges the non-retroactivity barrier it confronts, but seeks to surmount it by reference to *Smith v. City of Pittsburgh*, 764 F.2d 188 (3rd Cir.), *cert. denied*, 106 S.Ct. 349 (1985). But *Smith* was a procedural due process case, not an employment discrimination case, and the Third Circuit applied *Wilson v. Garcia* retroactively in *Smith* because there had been no clear circuit precedent as to the time limit for filing procedural due process cases. *See also, Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617, 2622 n.8 (retroactive application decreed in *Smith* because "the Third Circuit had not ruled definitively on which limitation period applied to *the particular § 1983 claim at issue there*" (emphasis added)). In that respect, of course, procedural due process cases are distinguishable from "employment discrimination or wrongful discharge" cases, as to which the "consistent rulings" of the Third Circuit were that a six-year time limit applied (Pet. App. 20a).

> Given our longstanding practice of borrowing state law, and the congressional awareness of this practice, we can generally assume that Congress intends by its silence that we borrow state law. . . . [T]he mere fact that state law fails to provide a perfect analogy to the federal cause of action is never itself sufficient to justify the use of a federal statute of limitations. [*Malley-Duff*, 107 S.Ct. at 2762.]

See also, Goodman v. Lukens Steel Co., 107 S.Ct. 2617, 2620 (1987) ("Because [42 U.S.C.] § 1981 . . . does not contain a statute of limitations, federal courts should select the most appropriate or analogous state statute of limitations").

Nothing in *Malley-Duff* casts doubt on the correctness of the Third Circuit's holding that § 510 of ERISA does not fit the exceptional circumstances that would warrant the borrowing of a statute of limitations from a different federal statute.[8] Congress expressly provided a statute of

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[8] The similarities petitioner purports to find between *Malley-Duff* and the instant case (Supp. Br. 4-7) are non-existent:

(1) Unlike *Malley-Duff*, where "the clear legislative intent [was] to pattern RICO's civil enforcement provision on the Clayton Act" (107 S.Ct. at 2765), there is no evidence that Congress intended to pattern ERISA § 510's enforcement processes on the NLRA. Congress selected for ERISA § 510 an entirely different procedure from that applicable to NLRA violations—a private lawsuit rather than an administrative proceeding prosecuted by a government agent—and, indeed, rejected a proposed amendment that would have created an administrative enforcement scheme (Br. Op. 18).

(2) *Malley-Duff* stressed the need for uniformity of time limits in civil RICO actions because RICO " 'encompass[es] numerous and diverse topics and subtopics' " and "[u]nder these circumstances . . . a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation'." 107 S.Ct. at 2763-64, quoting *Wilson v. Garcia*, 471 U.S. 261, 273, 272 (1985). In contrast, § 510 of ERISA encompasses only a single narrowly-defined cause of action.

(3) The Court rejected borrowing a "catch-all" statute of limitations in *Malley-Duff* in part because it had already determined that there needed to be a uniform characterization usable in all states

limitations for *certain* ERISA causes of action, § 413, 29 U.S.C. § 1113, but was silent as to the time limit for § 510 actions. Petitioner does not urge borrowing the ERISA § 413 time limit, as the instant suit would be timely under that provision. And it is surely improbable that Congress, having designated a time limit for some ERISA actions but not others, intended its silence as to the latter to signify that the time limit of a wholly unrelated federal statute should be borrowed.[9]

B. Petitioner's alternative quest—that the Court grant certiorari to decide whether a two-year rather than six-year Pennsylvania statute of limitations should have been borrowed for this case—is not supported by this Court's decision in *Goodman v. Lukens Steel, supra.* The factors that impelled this Court to approve borrowing of a "personal injury" time limit in *Goodman* are wholly absent here. In *Goodman,* the plaintiffs had *argued* that 42 U.S.C. § 1981 was principally an "interference with contractual rights" statute, and thus that the state time limit applicable to actions seeking to vindicate such rights should control, but this Court agreed with the Third Circuit that that was an inaccurate characterization of § 1981:

> [Plaintiffs'] submission is that § 1981 deals primarily with economic rights, more specifically the execu-

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and many states do not have a catch-all statute, 107 S.Ct. at 2765. That concern is inapplicable to § 510 of ERISA, as the need for uniformity does not exist.

[9] Nor is there reason to remand this case to the Third Circuit for reconsideration in light of *Malley-Duff.* The Third Circuit had the benefit of this Court's decision in *Del Costello* when it decided this case, but concluded, for reasons it detailed in its opinion (Pet. App. 23a-30a), that the factors prompting borrowing of a federal time limit in *Del Costello* were not applicable in the instant case. There can be no reason to think that *Malley-Duff* would alter the Third Circuit's decision: as the Third Circuit found *Del Costello* inapplicable—a labor case that borrowed the very time limit (§ 10(b) of the NLRA) that petitioner urges be borrowed in this case—it is inconceivable that *Malley-Duff,* which involved wholly unrelated statutes, would alter that court's view.

> tion and enforcement of contracts, nd that the appropriate limitations period tc borrow is the one applicable to suits for interference with contractual rights, which in Pennsylvania was six years.
>
> The Court of Appeals properly rejected this submission. Section 1981 has a much broader focus than contractual rights. The section speaks not only of personal rights to contract, but personal rights to sue, to testify, and to equal rights under all laws for the security of persons and property; and all persons are to be subject to like punishments, taxes and burdens of every kind. [107 S.Ct. at 2621.]

Given the need for a uniform limitations period applicable to all of the diverse subjects encompassed by § 1981 (*id.*), the Court found inapposite a time limit that would have been appropriate for only one of those subjects.

By contrast, the instant case involves a statute that applies *solely* to discrimination for the purpose of defeating employees' contractual pension rights; § 510 of ERISA *is* what the plaintiffs in *Goodman* unsuccessfully asserted § 1981 to be. Thus, the characterization that *Goodman* deemed inapposite to § 1981 is apt for ERISA § 510. And that is precisely the basis upon which the Third Circuit distinguished this case from its own decison in *Goodman* (Pet. App. 20a-21a, nn.20, 21).[10]

In sum, this Court's decision in *Goodman* does not alter the character of the limitations issue, for the instant case is distinguishable from *Goodman* in the ways already identified by the court below in its opinion.[11] And there

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[10] This Court's opinion in *Goodman* approved and adopted the rationale stated in the Third Circuit's *Goodman* opinion, 107 S.Ct. at 2621, and the Third Circuit in the instant case declared its *Goodman* holding and rationale inapplicable to this case because § 510 of ERISA, unlike 42 U.S.C. § 1981, is not a multi-issue statute. In light of this, there can be no warrant for remanding this case for reconsideration in light of *Goodman*: the court below has *already* considered and declared inapposite the holding and rationale of *Goodman*.

[11] Petitioner seeks support from this Court's observation in *Goodman* that "racially discriminatory interference" with the vari-

is nothing about the distinction drawn by the court below that is remarkable or warrants this Court's attention.[12]

Respectfully submitted,

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ous rights enumerated in § 1981 constitutes "a fundamental injury to the individual rights of a person," (107 S.Ct. at 2621). Even if this could be read as expressing a view that statutes applying solely to racially-motivated interference with contractual rights should be governed by personal injury rather than contractual time limits—and we do not think that reading is warranted—it would have no application here. Discrimination based on race is an insult to the person and thus in some sense inevitably constitutes a personal injury. By contrast, the only discrimination prohibited by § 510 is discrimination for the purpose of defeating contractual pension rights, a vice that closely resembles interference with contractual rights and that does not turn on personal attributes of the victim at all.

[12] Because neither of petitioner's theories for securing a shorter time limit is worthy of the Court's attention, it is perhaps superfluous to note that, even were there substance to petitioner's contention that recent decisions of this Court dictate a shorter time limit for § 510 of ERISA, and even if that shorter time limit could be applied retroactively to this case, such a holding would not avail petitioner because its concealment of its liability avoidance plan until after suit was filed (Pet. App. 16a), and its non-disclosure to employees that they had been permanently laid off (*id.* 13a), would have tolled any shorter time limit. *See*, Br. Op. 20 n.8.